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Nos. 79-1741, 79-1744 and 79-1759

In the Supreme Court of the United States

OCTOBER TERM, 1979

ROY TIBBALS WILSON, ET AL., PETITIONERS
v.
OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA

RPG, INC. ET AL., PETITIONERS
v.
OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA

STATE OF IOWA, ET AL., PETITIONERS
v.
OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1741

ROY TIBBALS WILSON, ET AL., PETITIONERS

v.

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA

No. 79-1744

RPG, INC. ET AL., PETITIONERS

v.

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA

No. 79-1779

STATE OF IOWA, ET AL., PETITIONERS

v.

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINIONS BELOW

The opinion of the district court is reported at 433 F. Supp. 57 and 67. The first opinion of the court of appeals is reported at 575 F. 2d 620. The opinion of this Court on review of the first judgment of the court of appeals (A. 2-31)[1] is reported at 442 U.S. 653. The opinion of the court

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[1]"A." refers to the separate appendix to the petition in No. 79-1741.

of appeals on remand (~~Pet. App.~~ 31-48) is reported at 614 F. 2d 1153.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1980. Timely petitions for rehearing were denied on February 8, 1980 (A. 49). The petitions for a writ of certiorari were filed on May 2 and May 7, 1980. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

25 U.S.C. 194 provides:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied the law of Nebraska to the facts of this case in determining that the private petitioners had not met their burden of persuasion to show that the Missouri River moved by accretion in eroding away the lands of the Omaha Indian Tribe between 1867 and 1923.

2. Whether 25 U.S.C. 194 creates a racial classification that violates the Due Process Clause of the Fifth Amendment.

STATEMENT

Petitioners in these related petitions seek review of the decision of the court of appeals after this Court's remand

in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979).[2] The background of the litigation is set forth in the Court's prior opinion. *Id.* at 658-661. Briefly, the lands in question, then in Nebraska and bordering on the Missouri River, were confirmed to the Omaha Tribe pursuant to the Treaty of 1854. In 1867, a survey by T. H. Barrett of the General Land Office established that the reservation included a large peninsula jutting east toward the Iowa side of the river around which the river flowed in an oxbow curve known as Blackbird Bend. Since 1927, the river has been west of its 1867 position, leaving most of the area surveyed by Barrett on the Iowa side of the river, separated from the rest of the reservation. This area was occupied and farmed by non-Indian Iowa residents until April 2, 1975, when they were dispossessed by the Tribe with the assistance of the Bureau of Indian Affairs.

In this litigation, the Tribe and the United States (on behalf of the Tribe) seek to quiet title to ownership of a tract of land now on the east bank of the Missouri River in Iowa which was formerly in Blackbird Bend. The defendants are the State of Iowa and certain landowners in Iowa.[3] After trial without a jury, the district court ruled that the Tribe did not own the disputed land. The court held (i) that under an applicable compact between Iowa and Nebraska, Nebraska law governed the resolution of the property law questions, (ii) that under Nebraska law

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[2]We refer to petitioners in No. 79-1741 as "Wilson," to petitioners in No. 79-1744 as "RGP," and to amici Dahl and other amici farm operators as "Dahl."

[3]The State of Iowa (No. 79-1779) claims title to certain lands deeded to it by quitclaim and to the bed of the Missouri between the thalweg and the ordinary high-water mark, any islands formed in that portion of the river and any abandoned channels. See 442 U.S. at 657 n.2. The private parties (Nos. 79-1741 and 79-1744) claim title to or a right to occupy other portions of the disputed tract.

the Tribe could prevail only if it could show that the land on the Iowa side of the river had been cut off from the reservation by avulsion, (iii) that an avulsion may be found under Nebraska law only when "identifiable land in place" remains after the avulsion, (iv) that Blackbird Bend had been washed away and not severed by avulsion, (v) that the riparian lands in Iowa had been deposited by accretion, and (vi) that the presumption favoring Indians in 25 U.S.C. 194 (see page 2, *supra*) was inapplicable.

The court of appeals reversed. It held that the presumption of 25 U.S.C. 194 was applicable and that the defendants, as non-Indians, had not proven the disputed land was the product of accretion under federal common-law principles, which the court concluded were controlling. 575 F. 2d 620.

On writ of certiorari, this Court affirmed in part and reversed in part, holding: (i) the presumption in 25 U.S.C. 194 is applicable to all defendants except the State of Iowa (442 U.S. at 655-669), (ii) federal law governs the determination of the actual boundary of the reservation and hence the ownership of the disputed territory (*id.* at 669-671), and (iii) in the circumstances of the case, federal law should borrow the law of Nebraska in light of the interstate compact (*id.* at 678). The Court remanded the case to the court of appeals to consider whether the district court had correctly interpreted Nebraska law and had properly applied it to the facts of this case.

On remand, the court of appeals held that the district court had not properly applied Nebraska law to the facts of this case. Under Nebraska law, the court of appeals held (A. 37-39), the defendants could prevail only if the change was accretive. An accretive change has two elements (A. 38-39): (i) "a boundary changes only where the River's change of channel is caused by a process

of erosion or excavation of earth from one bank and deposition of unidentifiable silt and sediment on the other—the land between the old and new channels must be completely disintegrated", and (ii) the erosion must be " 'gradual and imperceptible.' " although the court recognized that such erosion may sometimes occur rapidly. On the other hand, under Nebraska law, the court held (A. 41) that "avulsion occurs when there is a sudden and rapid change of the channel, within or without the bed of a stream, whether or not intervening land is submerged during a sudden flood." Thus, the essential difference between accretion and avulsion is "between sudden and perceptible change and the process of erosion and gradual, imperceptible deposition" (*id.* at 42). The court rejected petitioners' and the district court's theory that an avulsion may be found only when there is "identifiable land in place," that is, when land in between the old and new channel can be traced to land in that position before the avulsion. Although the existence of identifiable land in place would be persuasive evidence of avulsion (*id.* at 43), the court held that lack of such evidence does not absolutely preclude a finding of an avulsion (*ibid.*). Applying these definitions of accretion and avulsion, the court held that all petitioners other than the State of Iowa had failed to prove accretion had occurred (*id.* at 46-48).

Moreover, the court held (A. 46) that even if identifiable land in place is a sine qua non of avulsive movement under Nebraska law, petitioners' proof was too speculative, in light of the burden of proof required by 25 U.S.C. 194, to support the conclusion that the change had been accretive. Since all petitioners other than the State of Iowa have the burden of proof under 25 U.S.C. 194, the court held that petitioners' proof failed to establish that the channel change had occurred through erosion.

Accordingly, as to those petitioners, the court directed judgment in favor of the Tribe and the United States.

Concerning the State of Iowa, as to which 25 U.S.C. 194 is inapplicable, the court observed (A. 47) that the "record is not clear as to the time period and as to the specific land involved, in the Tribe's claim that land allegedly owned by the State was cut away from the reservation by avulsion." The court remanded to permit the Tribe to point out specific evidence relied upon to show avulsion on the particular land claimed by the State so that the district court "may separately review whether the Tribe has sustained its burden of proof against the State" (*id.* at 47-48).

ARGUMENT

The decision of the court of appeals is correct and properly applies the law of Nebraska to the facts of this case. There is no reason for this Court to review either the applicable rule of state law or the factual determinations of the court of appeals. As to the constitutionality of 25 U.S.C. 194, this Court's decisions establish that federal statutes may single out Indians for special protection and not violate constitutional standards. As this Court implicitly recognized in its previous decision in this case, 25 U.S.C. 194 is no exception.

1. Contrary to the argument of the State of Iowa (79-1779 Pet. 9-10), Wilson (79-1741 Pet. 14-30), and Dahl (Br. 9-10), conclusive evidence of "identifiable land in place" is not a sine qua non of an avulsion under Nebraska law. The court of appeals properly construed Nebraska law on this point.

a. Essentially, petitioners contend that in certain periods between 1875 and 1923 the river steadily cut through and washed away the 2900 acres of Blackbird

Bend, and other loose soil from upstream simultaneously accreted to the opposite bank. The Tribe and the United States essentially contend that for the periods 1875-1879 and 1912-1923 the river made one or more avulsive jumps westward cutting one or more chutes across the peninsula and eventually forcing a new thalweg at the base of the peninsula, creating "islands" between the old channel, the chutes, and the ultimate main channel. The district court ruled for petitioners because there was no convincing evidence of "identifiable land in place," that is, "a body of land * * * that after the shift * * * remains identifiable as land which existed before the change of the channel and which never became a part of the river bed" and is "capable of identification as such." 433 F. Supp. at 73, 88, 90. Despite the Tribe's and the government's evidence of avulsion (summarized at 575 F. 2d at 639-650), the district court held that the land in question was properly not part of Blackbird Bend but, rather, an accretion of silt to the Iowa bank from upstream and therefore the plaintiffs had not carried their burden of proof. 433 F. Supp. at 88.

Although accepting the district court's general statements of the law of Nebraska concerning accretions and avulsions, the court of appeals held that the district court erred in elevating evidence of identifiable land in place to a sine qua non of an avulsion under Nebraska law. The court of appeals held that on the facts of the present case it was entirely plausible that the disputed land was once part of Blackbird Bend even though there is no conclusive proof that permits such tracing. Evidence of identifiable land in place, the court held (575 F. 2d at 637; A. 43), is highly probative confirmation of an avulsion, but its absence does not automatically negate an avulsion. The same land may well be in place but not be identifiable as such. For the reasons set forth at length by the court of appeals (A. 34-37), the court of appeals

correctly applied Nebraska law to the unique circumstances of this case.[4]

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[4]Nothing in Nebraska law requires a showing of identifiable land in place in order for there to be an avulsion. To be sure, many Nebraska cases discuss the question of identifiable land in place, since if such land can be shown with certainty, then clearly an avulsion has occurred. Thus, the court of appeals acknowledged that the presence of identifiable land in place is often a significant factor in avulsion-accretion cases (A. 42-43). Nonetheless, no Nebraska case states that identifiable land in place is a sine qua non for an avulsion, and petitioners point to none. Petitioners place emphasis on *Conkey* v. *Knudsen, (Conkey II)*, 143 Neb. 5, 8 N.W. 2d 538 (1943) vacating 141 Neb. 517, 4 N.W. 2d 290 (1942); *Iowa R.R. Land* v. *Coulhard*, 96 Neb. 607, 148 N.W. 328 (1914); and *First National Bank* v. *McFerrin*, 142 Neb. 617, 9 N.W. 2d 167 (1943), as requiring identifiable land in place. None of those cases stand for that proposition. Thus, *Conkey II* merely holds that identifiable land in place is a factor which may be considered. *Iowa R.R. Land* was a case where all parties agreed that the river had moved by avulsion, 148 N.W. at 329, and the question of whether identifiable land in place was required never arose. *First National Bank* again does not require identifiable land in place for an avulsion; the precise holding merely submits to the jury the question of how the river actually moved in the pertinent time period.

Nor is the opinion of the court of appeals at war with *Wiltse* v. *Bolton*, 132 Neb. 354, 272 N.W. 197 (1937) (see 79-1741 Pet. 14-15). The court in *Wiltse* emphasized that the shift in the channel of the Missouri River involved in that case was by the gradual erosion and building up of land (272 N.W. at 199):

> As a result of the deposit of soil-building material during high water, Boyd's slough had gradually filled, so that there is no channel there now and has not been for many years. By the same process the sand-bar to the west of Boyd's slough has been built up until at the present time, a large portion of the same is suitable for cultivation.

Moreover, the court of appeals was clearly correct in stating that, under Nebraska law, the essential characteristic of an avulsion is a rapid change in the channel of the river. See, *e.g.*, *Valder* v. *Wallis*, 196 Neb. 222, 242 N.W. 2d 112, 114 (1976), which defined avulsion as " 'a sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream.' "

b. Moreover, the issue is solely one of state law. No substantial federal question is presented within the meaning of Rule 19 of the Rules of this Court. Although this Court will review a federal decision on "an important state" issue decided "in a way in conflict with applicable state or territorial law" (see Rule 19(b)), no decision of any Nebraska court on similar facts holds that the absence of evidence of "identifiable land in place" precludes a finding of avulsion (see note 4, *supra*). In these unexceptional circumstances, "the considered determination of questions of state law by the intermediate federal appellate courts" (and, we add, by a panel of three active judges of the circuit in which Nebraska is included) does not warrant review. *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944).

c. At all events, the issue whether identifiable land in place is a sine qua non of an avulsion is simply not presented by this case. The court held that, whether or not identifiable land in place is an element of avulsion, the private petitioners had not carried their burden of proof under 25 U.S.C. 194. There may well have been identifiable land in place in 1879 and in 1923.[5] Because of the paucity of maps and the lack of actual witnesses, it is impossible to know for certain. Petitioners' proof was simply too speculative to establish that such land was not in place. Thus, as to such petitioners, this case does not present the state-law issue urged by petitioners.

The State of Iowa's petition is premature. This Court does not ordinarily issue a writ of certiorari to review a decree of a court of appeals of an order remanding a case for further proceedings. *American Construction Co.* v. *Jacksonville, T. & K. Ry.*, 148 U.S. 372, 384 (1893); *Brotherhood of Locomotive Firemen* v. *Bangor &*

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[5]See pages 11-12, *infra*, 575 F. 2d at 641; A. 46.

Aroostock R.R., 389 U.S. 327, 328 (1967). The court of appeals remanded the present case to the district court to allow the Tribe and the United States, without the benefit of 25 U.S.C. 194, to point out specific evidence that establishes an avulsion. On remand, the State may ultimately prevail and thus obviate any quarrel by the State of Iowa with the court's analysis of Nebraska law. No extraordinary circumstances warrant this Court's review of this nonfinal aspect of the order.[6]

2. In similar vein, the State of Iowa (79-1779 Pet. 18) and Wilson (79-1741 Pet. 12, 19-22) attack the court of appeals' general statement of the rule of avulsion on the ground that it would theoretically comprehend a sudden shift of the thalweg from one part of the river bed to another part without any change in location of the bed itself. Such a result, they contend, would be inconsistent with Nebraska law.[7] It is clear, however, that that is not what happened in the present case. The river plainly did change its bed. This case does not present the issue of the

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[6]The State of Iowa (79-1779 Pet. 10-13) and Dahl (Br. 9-11) contend that review is warranted to settle the federal common law's definition of avulsion and accretion. That issue is plainly not presented by this case inasmuch as this Court and the court of appeals have held that the case is controlled solely by Nebraska law. The court of appeals' discussion of federal common law was merely dictum and is not determinative of any state's river rights.

[7]Inasmuch as Nebraska law is controlling, petitioners' reliance on the special master's report in *Louisiana* v. *Mississippi*, 384 U.S. 24 (1966), is beside the point. In any event, it is factually inapposite. The report found that the movement of the thalweg in the Mississippi River had been by accretion. That finding was made on the determination that the channel had moved gradually, as well as on the finding that the movement of the channel in the bed of a river does not constitute an avulsion. Moreover, this Court's per curiam affirmance, without discussion, did not establish the correctness of the master's conclusion that no avulsion could have occurred even if the change in the channel had been sudden.

ownership of a submerged river bed where there is a shift of the thalweg within a fixed bed.

The court of appeals did, however, correctly apply Nebraska's island rule. As stated in *Valder* v. *Wallis*, 196 Neb. 222, 225, 242 N.W. 2d 112, 114 (1976), quoting from *State* v. *Ecklund*, 147 Neb. 508, 23 N.W. 2d 782 (1946) (emphasis added):[8]

> Where a river changes its main channel, *not by slowly excavating and gradually passing over the intervening space to a new position, but changes it by flowing around intervening land*, as by gradually, during many years, deepening a smaller channel which was on the other side of an island until it becomes the main channel, the boundary which was fixed as the original main channel remains, under such conditions, in that original channel.

That is in essence what respondents contend occurred in the present case. As chutes were formed across the peninsula, islands were formed between the chutes and the river gradually diverted from the old main channel through the chutes, although the change probably occurred much faster than in the typical "island rule" case.[9]

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[8] *Ecklund, supra*, 147 Neb. at 521, 23 N.W. 2d at 789, in turn quotes from the Eighth Circuit's decision *Commissioners of Land Office of State of Oklahoma* v. *United States*, 270 F. 110, 113 (1920).

[9] Barrett's field notes (Tribe Exh. 26E) stated in part in reference to the peninsula:

> Until very recently, appearances indicated that this point was increasing in size from the deposits and drift of the river; but, during the present season, the river, rising to a great height, partly worked a channel across it, which may, eventually, entirely detach it from the Nebraska shore, rendering it an island in the river.

Under respondents' view of the facts, the avulsion probably occurred at a time of high water. At that time, some of the intervening land may have been covered for a time. But if the land maintained its character and was not eroded away, the principle of *Valder* v. *Willis* would govern and title to the land would remain in the Tribe. When the water level settled to normal levels, the land would reemerge intact.

The State of Iowa (79-1779 Pet. 13) and Wilson (79-1741 Pet. 21-22) insist that the present case involves no more than the shifting of sandbars within the bed of the Missouri River. That is mere speculation. Admittedly, the eastern point of the Barrett peninsula was a relatively low, sandy point. See Barrett's field notes (Tribe Exh. 26E). But the peninsula was not so low as to be part of the bed of the river. Barrett thought that the point might eventually be separated from the mainland and become an island (see note 9, *supra*). Moreover, the peninsula was not insubstantial. According to Barrett's sketch, it was more than a mile wide. Nor are the "bars" shown on the 1879 map merely shifting mounds of sand (see Plate II, 575 F. 2d at 626). At a time when much of the surrounding fast land was innundated, they appeared as distinct land forms (see *id.* at 642). In fact, other land, shown as submerged on the 1879 map, may well have reemerged when the water receded to normal. As the court of appeals stated (*ibid.*), inferences drawn from the land forms drawn on the 1879 map are conjectural in view of the concededly very high state of the water when it was drawn.

3. In light of the presumption applicable under 25 U.S.C. 194, the court of appeals held (A. 46-47) that the finding by the district court, made after a bench trial and in reliance mainly on old records and maps, that the river moved by accretion was clearly erroneous even if

"identifiable land in place" is a sine qua non of avulsion. Wilson (79-1741 Pet. 32-35) and RGP (79-1744 Pet. 8-10) contend that the district court's finding was not clearly erroneous. In its first opinion the court of appeals examined in great detail the available maps, documentary evidence, and expert testimony and carefully explained the way in which the district court had erred. See 575 F. 2d at 639-651. In essence, the court found that the district court had resolved each doubt and uncertainty in favor of accretion (See A. 35). This was erroneous because the private petitioners—not the Tribe—had the burden of proof under 25 U.S.C. 194. In light of the thorough and careful analysis of the court of appeals, on which we rely, there is no need for this Court to retrace and resift the facts of this case.[10]

4. RGP (79-1744 Pet. 6-7) contends that the presumption of 25 U.S.C. 194 offends *Tot* v. *United States*, 319 U.S. 463 (1943), because (i) it is not rational to presume continuity of Indian ownership for 100 years or more and

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[10]The court of appeals spent nearly a year from the date this case was submitted to the date of decision of its first opinion. It carefully reviewed a great deal of testimony and concluded that the petitioners had not been able to show that the river moved by accretion. While in our view respondents' factual case is convincing, nonetheless, there is little direct evidence of how the river moved. The 1867 Barrett map shows a peninsula extending eastward into the river. The only other documentary evidence of how the river after 1867 and prior to 1880 appeared was an 1875 map of Monona County, Iowa (A. 51) and the 1879 Missouri River Commission map (Plate II, 575 F. 2d at 626). The Iowa map did not purport to map the Nebraska side of the river and the 1879 map was done at a period of very high water. No other maps in that period were submitted. The precise movement of the river in that period is unknown. See 575 F. 2d at 639-646.

From 1912 to 1923, the evidence of accretion is similarly inclusive. Again there were few maps, and the available historical evidence did not provide a basis for determining that the river moved by accretion. Nor was the scientific evidence particularly helpful to petitioners' case. See 575 F. 2d at 647-650.

(ii) petitioners have had no fair opportunity to rebut the presumption. This is not so. It is entirely rational to presume that the Tribe has owned the disputed land for more than a century in light of the undisputed fact that the Tribe, with the possible exception of some allotments, never conveyed the property. Moreover, petitioners have had a fair opportunity to rebut the presumption, just as Section 194 requires. At the trial, petitioners were on notice that the Tribe and the United States contended that the presumption of Section 194 was applicable. Petitioners were in no way prevented from submitting all the proof they desired to demonstrate that accretion had occurred. Petitioners have thus had a fair opportunity to rebut the presumption.

RGP (79-1744 Pet. 8-9) and Wilson (79-1741 Pet. 30-31) contend that the court of appeals placed too stringent a burden of proof on petitioners and that Section 194 does not require petitioners to prove accretion beyond "any possibility of a doubt" (*ibid.*). This misstates the holding of the court of appeals. The court held that the available historical evidence was fully consistent with avulsion and that petitioners' theory, based on the same evidence, that accretion had occurred, was simply speculation. This did not require absolute proof of accretion, but it did require petitioners to present substantial evidence inconsistent with avulsion or a theory of accretion not dependent entirely on guesswork.[11]

5. Wilson (79-1741 Pet. 39-41), RGP (79-1744 Pet. 6-18) and Dahl (Br. 6-9) contend 25 U.S.C. 194 is

[11]Although this Court "noted" in *Wilson* (442 U.S. at 678) that the district court had found that petitioners had carried the burden of proving title by a preponderance of the evidence, this Court itself did not so hold. This Court did not reach the issue whether the court of appeals, after carefully evaluating the evidence, had properly held that petitioners' evidence was insufficient to establish accretion.

unconstitutional because it establishes an invidious racial discrimination. In granting certiorari in *Wilson*, the Court previously declined to review that issue. There is no reason for the Court do so now.

As this Court stated in *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974), the resolution of petitioners' due process claim must turn "on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian ward' status, to legislate on behalf of federally recognized Indian tribes." The Court there concluded that Congress' judgment in adopting "legislation that singles out Indians for particular and special treatment" will be upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." 417 U.S. at 554-555. In *United States* v. *Antelope*, 430 U.S. 641, 645 (1977) (footnote omitted), the Court reaffirmed this analysis, holding that—

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

Section 194, like the other special Indian legislation this Court has upheld, is directly related to the fulfillment of the United States' special obligation toward its Indian wards by protecting their most valuable property, their lands. In order to safeguard this vital asset against questionable claims, Section 194 provides that a non-

Indian claimant has the burden of proof when an "Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

CONCLUSION

The petitions for a writ if certiorari should be denied.

Respectfully submitted.

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